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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MANDAKINI PATEL et al., Plaintiffs and Appellants, v. LISABETH KUZMA DELBECQ, Defendant and Respondent.	H034417 (Santa Clara County Super. Ct. No. 1-05-CV040712)

In a personal injury action, after the jury found in favor of defendant Lisabeth Kuzma Delbecq, Delbecq sought recovery of statutory costs, including her expert costs under Code of Civil Procedure section 998.[1] Appellants Mandakini and Dushyant Patel brought a motion to tax costs, arguing that Delbecq was not entitled to expert costs because her section 998 offers were ambiguous. The trial court granted the motion in part, but allowed Delbecq to recover her expert costs.

The Patels timely appealed and contend that Delbecq's section 998 offers were ambiguous and thus could not support an award of expert costs. In addition, they argue that the aggregate cost award was excessive.

We disagree and shall therefore affirm.

[1] All further unspecified statutory references are to the Code of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Patels suffered personal injuries on May 15, 2003, when their vehicle was struck by a vehicle driven by Rowena Paz Bagamaspad. More than a year later, on June 17, 2004, Mandakini Patel was driving in the number one lane of a multi-lane freeway. According to Mandakini, Delbecq, who was driving ahead of Mandakini in the number two lane, made an unsafe lane change and caused Mandakini to drive into the median where her tire blew out and her vehicle swerved into the center divider.

The Patels filed a personal injury action against both Bagamaspad[2] and Delbecq. Dushyant Patel, who was not in the vehicle during the incident involving Delbecq, sought loss of consortium damages against her.

Following a nonbinding arbitration, the arbitrator made an award in favor of Mandakini and against Delbecq in the amount of $103,892. The award made no mention of Dushyant's loss of consortium claim against Delbecq.

On April 18, 2008, Delbecq served two section 998 offers to compromise on the Patels. The offer to Mandakini was in the amount of $11,001 and the offer to Dushyant was in the amount of $751. Both offers were made "in exchange for each of the following: [¶] 1. The entry of a Request for Dismissal, with prejudice, of the entire action (including any and all complaints, cross-complaints or actions filed by any party against or as to this defendant) and/or a finding that this compromise was entered into and constitutes a good faith settlement or compromise as to any cross-complaints; [¶] 2. The notarized execution and transmittal of a written settlement agreement and general release, including an indemnity and hold harmless agreement, in favor of this defendant from any and all liens and/or claims asserted by others arising out of or related to the incident which is the subject of this action." The Patels made no response to either offer.

[2] Bagamaspad admitted her negligence, settled during trial and is not a party to this appeal.

The Patels' motion to bifurcate the trial was granted, and the issue of liability was tried to a jury. On January 16, 2009, the jury found in favor of Delbecq.

Delbecq subsequently filed and served a memorandum of costs seeking recovery of statutory costs as the prevailing party, including $4,817.42 in costs for subpoenaing medical records and $290.82 in costs for blowups and photocopies of exhibits. Due to the Patels' failure to respond to her section 998 offers, Delbecq also sought recovery of her incurred expert witness fees in the amount of $14,283.85.

The Patels moved to tax costs, challenging Delbecq's right to recovery of expert fees on the grounds that the section 998 offers were ambiguous and that the expert costs claimed unreasonable and in excess of what is allowed. The motion also challenged the $290.82 claimed for blowups and photocopies on the ground that no such blowups were shown to the jury and thus could not have aided the jury in reaching a verdict. Finally, the Patels argued that there was no statutory basis for allowing Delbecq to recover the costs of obtaining medical records.

Following a hearing, the trial court entered a written order granting in part and denying in part the Patels' motion to tax costs. With respect to Delbecq's section 998 offers, the trial court found that any ambiguity caused by Delbecq's reference to dismissal of "the entire action" in the first paragraph was clarified by the language in the second paragraph indicating that the general release and hold harmless agreement was made "in favor of this defendant." The trial court also found that the offers were reasonable given the "serious difference of opinion between the parties in the perception of causation." Delbecq was awarded the full amount of expert fees requested as the court found they "were necessary and proper in the preparation for trial."

The order further determined that Delbecq was entitled to recover the full amount claimed for subpoenaing medical records and for photocopies and blowups as "they were used at the time of trial and were helpful to the trier of fact."

The Patels timely appealed.

II. DISCUSSION

A. Interpretation of the section 998 offers

1. Standard of review

The parties disagree as to the appropriate standard of review relating to the trial court's determination that the language of the section 998 offers was not ambiguous. The Patels contend that we conduct a de novo review of the language. Delbecq argues that we are to apply a substantial evidence test because the interpretation of her offers involves weighing extrinsic evidence. Because it does not appear from the record that the trial court considered any extrinsic evidence in interpreting the agreement and Delbecq cites no such evidence in her brief, the proper standard of review under these circumstances is de novo. (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710.)

2. The offers were not ambiguous

The Patels argue that Delbecq's section 998 offers were ambiguous because they were conditioned upon dismissal of the "entire action," which they read to include dismissal of their action against Bagamaspad.

We conduct our review of the terms of the offer under settled principles. Because stipulated judgments are regarded as contracts between the parties, we apply general contract principles to the interpretation of a section 998 offer. (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280.) Where contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms. (Civ. Code, §§ 1638, 1639; *Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1707.) However, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (*Id.* § 1643.) "Courts must

interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.)

Like the trial court, we find that the first numbered paragraph in Delbecq's section 998 offers, which required the Patels to enter a request for dismissal "of the entire action," could reasonably be read as requiring them to also dismiss their action against Bagamaspad, primarily because the parenthetical phrase appearing immediately following, i.e., "(including any and all complaints, cross-complaints or actions filed by any party against or as to this defendant)" creates the impression that the "entire action" encompasses complaints brought against *other* defendants. However, keeping in mind that we must look to the entirety of the offer in interpreting its provisions (Civ. Code, § 1641), the second numbered paragraph, which further requires the Patels to execute a general release "in favor of *this* defendant" (italics added), serves to clarify Delbecq's intent that the offer was made solely on *her* behalf, rather than on behalf of herself and Bagamaspad. Furthermore, the offers do not purport to have been made jointly by Bagamaspad and Delbecq, nor do they make any mention of Bagamaspad.[3]

B. The trial court did not abuse its discretion in awarding expert costs

The Patels argue that Delbecq's section 998 offers were made simply to put her in a position to recover her expert fees, rather than being a genuine attempt to settle the case before trial. They contend that the circumstances which Delbecq knew or reasonably

[3] Though the trial court does not appear to have relied on this information, the Patels admitted in their motion to tax costs that, at the time Delbecq's section 998 offers were pending, Bagamaspad had separately offered to settle Mandakini's claims and Dushyant's claims against her for $10,001 and $1,500, respectively. While we think Delbecq's section 998 offers, read as a whole, are unambiguous, the separate contemporaneous offers made by Bagamaspad provide further evidence that Delbecq's offers were not intended to encompass the Patels' claims against Bagamaspad.

should have known at the time of the offers, such as the police citing her for an unsafe lane change, her admission to not having signaled before changing lanes, the evidence of Mandakini's injuries and $1.4 million in lost earnings, and the substantial arbitration award in favor of Mandakini and against Delbecq, made it unreasonable for her to believe that the Patels would accept approximately $12,000 to settle their claims.

In reviewing an award of expert witness fees, we examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal. (*Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 64; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.) We find no abuse of discretion here.

The question whether a section 998 offer was reasonable is not decided by any mathematical formula, but rather depends on the circumstances of each case. (*Jones v. Dumrichob, supra*, 63 Cal.App.4th at p. 1262.) A defendant is entitled to make a "modest settlement offer," even if substantial amounts are at stake, based on his perception that he has a strong case. (*Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) Where the offer is refused, and defendant engages the services of an expert to establish his case, "[i]t is . . . consistent with the legislative purpose under such circumstances to require the plaintiff to reimburse the defendant for the costs thus incurred." (*Id.* at p. 711.) Furthermore, "the mere fact" that a plaintiff claimed large losses "does not mean that defendants' . . . offer was unreasonable or unrealistic." (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 118.)

In this case, there was no dispute that Delbecq's vehicle did not contact the vehicle driven by Mandakini; the only issue was whether Delbecq operated her vehicle in such a way as to cause Mandakini to drive into the center divide or whether Mandakini was herself at fault. The jury, after hearing the evidence, found in favor of Delbecq, apparently crediting her version of the events in question.

On the motion to tax costs, the trial court found the offer to be reasonable based on the fact that "there was a serious difference of opinion between the parties in the perception of causation[, and] [the Patels'] perception does not make [Delbecq's] offer unreasonable; there was just a difference of opinion on causation." Delbecq's offers were modest, but only if she were found liable for the Patels' injuries. A total of $11,752 was a reasonable amount based on Delbecq's objectively reasonable belief that there was no liability and that there was a strong likelihood she would prevail at trial. (See *Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1528-1529 [" 'When a defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer.' "].) We find there was no abuse of discretion in awarding expert witness fees under section 998.

C. The trial court did not abuse its discretion in the amount of expert witness fees awarded

The Patels further challenge $5,100 of the expert witness fees incurred by Delbecq for the services of Paul J. Mills, M.D. Three of Dr. Mills' four invoices, reflecting $4,100 in charges, were dated prior to the service of the section 998 offers and there was no documentation at all of $1,000 of costs claimed by Delbecq for Dr. Mills. In addition, the Patels contend that the trial court abused its discretion in awarding expert witness costs for two experts who were never disclosed or qualified as experts.

The Patels' argument regarding the fees incurred prior to service of Delbecq's section 998 offers has been rejected by the California Supreme Court in *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507 (*Regency*). Section 998, subdivision (c)(1), provides in pertinent part that "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, . . . the court or arbitrator, in its discretion, may require the

plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." Because the first sentence of this provision "limits recoverable 'costs' to those incurred from the time of the offer[, whereas] [t]he second sentence, which relates to the 'costs of the services of expert witnesses,' contains no such limitation," both pre- and postoffer expert witness fees may be awarded. (*Regency, supra*, at p. 532.) Consequently, the trial court acted within its discretion by awarding the $4,100 billed by Dr. Mills prior to the service of Delbecq's section 998 offers.

The trial court also did not abuse its discretion in awarding expert witness costs to Delbecq for the two experts whose existence was first disclosed to the Patels in the posttrial memorandum of costs. Section 998 does not condition an award of expert witness costs on prior disclosure of those witnesses to the plaintiff. All that is required is that an expert witness's fees be "actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (§ 998, subd. (c)(1).) Delbecq's counsel submitted a declaration to the trial court describing the services provided by these two witnesses in preparation for trial, and the trial court did not abuse its discretion in relying on that evidence in making its award.

As to the $1,000 that the Patels contend is undocumented, they did not raise this issue to the trial court and have thus forfeited this claim. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

D. The trial court did not abuse its discretion in awarding costs for blow-ups and exhibits

The Patels argue that the trial court should have disallowed the costs Delbecq claims to have incurred for models, blow-ups and exhibits as Delbecq used only a single photo of Mandakini's vehicle during trial and the jury only observed a small fraction of the items for which the costs were assessed.

The right to recover costs is statutory. (*Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 241 (*Perko's*).) Section 1033.5, subdivision (a)(12) allows models, blowups of exhibits and photocopies of exhibits as recoverable costs, so long as they are reasonably helpful to assist the trier of fact. Section 1033.5 also provides that "[a]llowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" and "reasonable in amount." (§ 1033.5, subd. (c)(2), (3).) These requirements apply equally to costs awarded as a matter of right and costs awarded at the discretion of the trial court. (*Perko's*, *supra*, at pp. 244-245; see § 1032, subds. (a)(4), (b).)

Whether costs items are reasonably necessary or reasonable in amount are factual questions for the trial court and we review its findings on such questions for abuse of discretion. (*Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39.) The trial court is in the best position to ascertain which exhibits were presented at trial and determine if they were reasonably helpful to the jury. Here, the trial court expressly found that "the costs of the photos and blow ups are recoverable . . . because they were used at the time of trial and were helpful to the trier of fact." There is nothing in the record which establishes that the trial court abused its discretion in making this finding.

III. DISPOSITION

The order on the motion to tax costs is affirmed. Delbecq shall recover her costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.